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No. 99-1140

IN THE

Supreme Court of the United States

AARON THOMAS TALLAKSON, *et al.*,
Petitioners,

v.

BAXTER HEALTHCARE CORPORATION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners, who explicitly stated their intention to participate in a nationwide class settlement by electing to file claims for payment under the settlement, may, after two years, change their minds and seek, on collateral attack, to have the final judgment that approved the settlement declared void so petitioners can pursue the individual litigation against defendants that the settlement was intended to end?

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondents state the following:

The parent company of Rhône-Poulenc Rorer Inc. is Aventis S.A. All subsidiaries of Rhône-Poulenc Rorer Inc. are wholly owned.

The parent company of Armour Pharmaceutical Company is Rhône-Poulenec Rorer Inc. All subsidiaries of Armour are wholly owned.

The parent company of Bayer Corporation is Bayer A.G. Schein Pharmaceutical, Inc., Onyx Pharmaceuticals, Inc., Millennium Pharmaceuticals, Inc., and Myriad Genetics, Inc. are non-wholly-owned subsidiaries of Bayer Corporation.

Baxter Healthcare Corporation's parent company is Baxter International, Inc. Baxter owns stock in certain publicly-traded companies and is filing this information under seal with the Clerk of the Court.

The parent company of Alpha Therapeutic Corporation is Green Cross International, Inc. Business Travel Specialists, Inc., G.C. Pharmaceutical (Singapore) Ptc Ltd., Grifols UK Ltd., and Grifols Italia SpA are non-wholly-owned subsidiaries of Alpha Therapeutic Corporation.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
COUNTER STATEMENT OF THE CASE	3
REASONS THE PETITION SHOULD BE DENIED	11
CONCLUSION	24

TABLE OF AUTHORITIES

CASES

	Page
Amalgamated Sugar Co. v. NL Indus., Inc., 825 F.2d 634 (2d Cir.), *cert. denied*, 484 U.S. 992 (1987)	22
Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997)	*passim*
Barney v. Holzer Clinic, Ltd., 110 F.3d 1207 (6th Cir. 1997)	13
Croyden Assocs. v. Alleco, Inc., 969 F.2d 675 (8th Cir. 1992), *cert. denied*, 507 U.S. 908 (1993)	17
Dowling v. Alpha Therapeutic Corp., No. 97-2410 (7th Cir., appeal dismissed July 16, 1997)	7
Epstein v. MCA, Inc., 126 F.3d 1235 (9th Cir. 1997), *opinion withdrawn and superseded on rehearing*, 179 F.3d 641 (9th Cir.), *cert. denied*, 120 S.Ct. 497 (1999)	16, 20
Gottlieb v. Wiles, 11 F.3d 1004 (10th Cir. 1993)	17
Harper v. Virginia Dep't of Taxation, 509 U.S. 86 (1993)	19
In re Agent Orange Prod. Liab. Litig., 996 F.2d 1425 (2d Cir. 1993), *cert. denied*, 510 U.S. 1140 (1994)	13
In re Edwards, 962 F.2d 641 (7th Cir. 1992)	15
In re Factor VIII or IX Concentrate Blood Prod. Liab. Litig. (MDL-986), 853 F. Supp. 454 (J.P.M.L. 1993)	4, 21
In re Factor VIII or IX Concentrate Blood Prod. Litig., Appeals of Spece, Ibanez, and Mull & Mull and In re Mull & Mull, 159 F.3d 1016 (7th Cir. 1998), *cert. denied*, 119 S.Ct. 1488 (1999)	*passim*
In re Rhône-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir.), *cert. denied*, 516 U.S. 867 (1995)	22-23
Kansas City S. Ry. Co. v. Great Lakes Carbon Corp., 624 F.2d 822 (8th Cir.), *cert. denied*, 449 U.S. 955 (1980)	19
Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847 (1988)	13
Matter of Rhône-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir.), *cert. denied*, 516 U.S. 867 (1995)	4

TABLE OF AUTHORITIES—Continued

Page

Matter of VMS Sec. Litig., 103 F.3d 1317 (7th Cir. 1996) 23
Neuberg v. Michael Reese Hosp. Found., 123 F.3d 951 (7th Cir. 1997) 15
Norgaard v. DePuy Orthopaedics, Inc., 121 F.3d 1074 (7th Cir. 1997) 15, 19
Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999) ..19-20, 22
Otis v. Bayer Corp., No. 97-2556 (7th Cir., appeal dismissed July 24, 1997) 7
Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) 13, 20
SEC v. Randolph, 736 F.2d 525 (9th Cir. 1984) 21-22
Shults v. Champion Int'l Corp., 35 F.3d 1056 (6th Cir. 1994) 17
Twigg v. Sears, Roebuck & Co., 153 F.3d 1222 (11th Cir. 1998) 13
Wadleigh v. Rhône-Poulenc Rorer Inc., 157 F.R.D. 410 (N.D. Ill. 1994), *rev'd, Matter of Rhône-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995), *cert. denied*, 516 U.S. 867 (1995) 4
Walker v. Bayer Corp., 96-C-5024 (N.D. Ill.) 5
Williams v. Gen. Elec. Capital Auto Lease, Inc., 159 F.3d 266 (7th Cir. 1998), *cert. denied*, 119 S. Ct. 2392 (1999) 16
Zablocki v. Redhail, 434 U.S. 374 (1978) 13

FEDERAL STATUTES

Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 6
28 U.S.C. § 1651(a) 2, 11

FEDERAL RULE

Fed. R. Civ. P. 60(b) ..... *passim*

OTHER AUTHORITY

Herbert Newberg & Alba Conte, *Newberg on Class Actions* (3d ed. 1992) 18

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RESPONDENTS' BRIEF IN OPPOSITION

INTRODUCTION

The petition arises from the second in a series of collateral attacks upon the final judgment that approved the nationwide factor concentrate class settlement. Under the terms of that settlement, respondent fractionators [1] paid more than $600 million for claims that individuals contracted HIV from the plasma therapies used to treat hemophilia, a bleeding disorder. A year ago, this Court declined to review a previous collateral attack on this judgment, brought by certain plaintiffs' attorneys. *In re Factor VIII or IX Concentrate Blood Prod. Liab. Litig.*,

[1] "Fractionation" is the process by which plasma is separated into its different components. Fractionators are Armour Pharmaceutical Co., Bayer Corp., Baxter Healthcare Corp., and Alpha Therapeutic Corp. Also named as a defendant is Rhône-Poulenc Rorer Inc., the indirect parent corporation of Armour.

Appeals of Spece, Ibanez, and Mull & Mull and *In re Mull & Mull*, 159 F.3d 1016 (7th Cir. 1998) (Opp. App. 15a-22a), *cert. denied*, 119 S.Ct. 1488 (1999).[2]

The present petition is brought by a few class members, most of whom are represented by the same attorneys involved in that prior collateral attack. These class members did not timely opt out of the class and settlement; to the contrary, they filed claim forms seeking payment under the terms of the settlement. The final judgment that approved the class and settlement in May of 1997 explicitly extinguished their tort claims against fractionators. Pet. App. 92.

Nevertheless, these class members have continued to litigate their individual claims against fractionators in state court. They claimed that 1) the judgment that approved the class settlement was void and 2) the individual releases required to receive payment under that judgment should be treated as individual settlement offers. These class members assert that, by refusing to sign their releases, they can simply walk away from the settlement.

The district court—which had heard all these arguments in the prior collateral attack—observed that "[t]his case is the paradigm situation to employ the All Writs Act," 28 U.S.C § 1651(a). Opp. App. 6a. The court

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[2] Petitioners' Statement of the Case begins with a pastiche of truths, half-truths, and outright lies that are (a) devoid of any citations to the record below and (b) in any event, irrelevant to the issues presented in their petition. *See* Pet. 2-4. To support fractionators' Counter Statement of the Case, fractionators have reproduced certain key materials in the appendix to this brief ("Opp. App.") and have lodged with the Clerk of the Court copies of fractionators' appendix to their brief in the court of appeals ("FA"), which reproduces additional settlement documents and excerpts from the record of this case. Fractionators have moved to lodge this appendix under seal because it contains the medical records of petitioners.

therefore granted fractionators' motion to enjoin the lawsuits and denied petitioners' cross motions for Rule 60 relief from the final judgment that approved the class settlement. Opp. App. 1a-2a; Pet. App. 3-9. The United States Court of Appeals for the Seventh Circuit affirmed in an unpublished, one-paragraph order that relied upon reasoning set forth in the orders of the district court and the judgment of the court of appeals that rejected the prior collateral attack. Pet. App. 1-2.

There is nothing about the decision of the court of appeals that is remotely worthy of review. The decisions below do not conflict with the precedents of this or any other court. Petitioners were not deprived of their day in court. They simply lost on the merits. The judgments below were correct and limited to the bizarre procedural posture of petitioners' claims (circumstances of petitioners' own making). Accordingly, certiorari should be denied.

COUNTER STATEMENT OF THE CASE

1. Hemophilia is an incurable bleeding disorder caused by deficiencies of certain clotting factors in the blood. It is treated by administering the missing clotting factors to the patient. In the late 1960s and early 1970s, fractionators developed freeze-dried clotting factor concentrates that resulted in "the return to a full range of activities for many patients who were previously wheelchair-bound" and, between 1968 and 1983, a doubling in the life expectancy of persons with hemophilia.[3] However, the advent of the disease now known as AIDS had a tragic impact on persons with hemophilia. Before anyone knew that AIDS was transmissible by blood and plasma products, thousands of hemophiliacs were infected with the

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[3] Leon W. Hoyer, M.D., *Medical Progress: Hemophilia A*, 330 New Eng. J. Med. 38 (Jan. 6, 1994).

retrovirus now called HIV and known to be the cause of AIDS. Opp. App. 16a.

2. Lawsuits have been filed in state and federal courts alleging almost 800 cases of HIV transmission through factor concentrates. In late 1993, all pending federal factor concentrate cases were consolidated in the Northern District of Illinois before Judge John F. Grady. *In re Factor VIII or IX Concentrate Blood Prod. Litig. (MDL-986),* 853 F. Supp. 454, 456 (J.P.M.L. 1993). In 1994, the district court certified a nationwide "issue" class for the purpose of determining in a single trial whether the fractionators were "guilty of ordinary negligence." *Wadleigh v. Rhône-Poulenc Rorer Inc.*, 157 F.R.D. 410, 426 (N.D. Ill. 1994). The court of appeals subsequently issued a writ of mandamus ordering the district court to decertify the class. *Matter of Rhône-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995). This Court denied certiorari, 516 U.S. 867 (1995), and the class was decertified.

3. On April 19, 1996, fractionators proposed a settlement that would pay up to $100,000 for each claimant group related to (a) each HIV-positive hemophiliac who used factor concentrate and (b) certain persons allegedly infected with HIV through exposure to such hemophiliacs. The total value of this part of the April 1996 settlement proposal was limited to $600 million; if more than the anticipated 6,000 claims were filed, then each claimant would be paid less than $100,000. FA 324, 332. The Plaintiffs' Steering Committee ("PSC") rejected fractionators' proposal. FA322.

After several months of intense negotiations, fractionators and PSC agreed to the present class settlement, in which fractionators agreed to pay $100,000 for each claim, even if the number of claims exceeded 6,000. Pet.

App. 16 § B. The settlement agreement expressly required claimants to execute releases in order to receive payment. Pet. App. 46 § M. Fractionators also undertook to pay additional monies to resolve federal and state Medicare and Medicaid claims as well as the claims of most private health insurers, so that claimants would receive the settlement payments free and clear of most outstanding claims. Pet. App. 50 § P(1). Finally, the settlement agreement provided that a separate $40 million fund, to be established by fractionators, would be the exclusive source for all costs and attorneys' fees, which could be awarded by the district court. Pet. App. 44-45 §§ L(2) & (5).

4. In August 1996, PSC sought preliminary certification of a nationwide settlement class in the case of *Walker v. Bayer Corp.*, 96-C-5024 (N.D. Ill.). FA 334-37. The class notice and settlement agreement clearly stated that (a) class members who wanted to receive payment under the settlement (if the class and settlement received final approval) were required to file claim forms, and (b) persons who wanted to opt out of the class in order to pursue individual litigation were required to file opt-out forms on or before October 15, 1996. Pet. App. 67-71; FA 23-27, 59-60. The notice and settlement agreement made equally clear the consequences of failure to opt out by that date. If the class and settlement received final approval, judgment would be entered barring any claim against fractionators that an HIV-infected person allegedly suffered as a result of the use of factor concentrates processed or distributed during the class period. Pet. App. 33 § 6, 72 § 9. The settlement agreement expressly stated that fractionators would have the opportunity to review the opt-out forms before making a final determination whether to go forward with the settlement. Pet. App. 14 § A2(c). The vast majority of persons who were entitled to file claims did so.

All of the petitioners now before this Court filed claim forms seeking payment under the terms of the notice and settlement agreement. FA 91, 107, 119, 128, 138, 150, 191, 201, 211, 222, 251, 261. In deciding to file their claim forms, several petitioners received separate legal advice in addition to that available from class counsel.[4]

5. On November 25, 1996, the district court held a day-long fairness hearing. FA 338. None of the petitioners or their attorneys objected to the terms of the settlement or raised any of the arguments now before this Court. The district court did not rule immediately upon the fairness of the settlement because, *inter alia*, fractionators were still negotiating with the United States government, state governments, and dozens of insurers seeking to compromise claims against settlement monies that would be paid to class members. FA 348.[5]

While these negotiations were underway, certain dissident plaintiffs' attorneys argued that class members should be given a new opportunity to opt out of the settlement based upon "newly discovered" evidence and alleged

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[4] The following claimant groups identified in their claim forms their individual attorneys: Tallakson and Davon were represented by Mull & Mull; the Castilles were represented by Barham & Arceneaux; Jane Doe was represented by Roy Spece, and the Lindgren claimant group was represented first by Michael Dan and later by Mull. FA265, 142, 123, 154, 226. Mull, Spece, and Arceneaux were key participants in the prior collateral attack on the class settlement. Arceneaux is counsel of record for all petitioners.

[5] Fractionators eventually paid more than $30 million to secure these compromises. Working with PSC and the hemophilia commuunity, fractionators also secured the passage of legislation that endorsed the factor concentrate class settlement by name and provided that receipt of the $100,000 settlement payment would not affect claimants' eligibility for medical assistance and disability payments. *See* Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4735, 111 Stat. 251, 522.

fraud on the part of fractionators and PSC. FA 364, 368-69. The district court addressed these matters at a second fairness hearing on May 6, 1997. At the conclusion of that hearing, the district court concluded that the attorneys had not identified any new evidence or colorable basis for their fraud allegations. FA 400-04. The court stated that it had received form letters from some class members, including at least one of the petitioners, seeking to opt out based upon "new" information. FA 401-03, 242. The court stated that "these letters have the earmarks of having been written by well-intentioned people who have simply been misled by erroneous information," FA 403, and refused to reopen the opt-out period.

6. On May 8, 1997, the district court entered final judgment certifying the class, approving the settlement, and ordering the parties to implement the settlement agreement according to its terms. Pet. App. 77-94.[6] The final judgment expressly barred claims against fractionators by class members who had not filed timely opt-outs. Pet. App. 92.

However, the district court continued to receive correspondence from class members, again including one of the petitioners, FA 247-49, and was concerned that "[m]any class members appear to have been misled" about supposed new information "by persons who have been encouraging them to request permission for late opt-outs." FA 427. Accordingly, on May 15, 1997, the district court entered an "Order Concerning Requests for Late Opt-Outs" that stated: "The purpose of this order is to make clear that the judgment order of May 8 is a bar to the filing of any individual suits by class members who

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[6] Two appeals were filed by nonparty class members, but were voluntarily dismissed. *See Dowling v. Alpha Therapeutic Corp.*, No. 97-2410 (7th Cir., appeal dismissed July 16, 1997); *Otis v. Bayer Corp.*, No. 97-2556 (7th Cir., appeal dismissed July 24, 1997).

did not opt out by October 15, 1996." FA 427. The court established a mechanism "to permit late opt-outs in extraordinary circumstances" that "would have prevented the class member from making an intelligent decision to opt out prior to the deadline." FA 426-27. None of the petitioners sought to avail themselves of this procedure.

7. Thereafter, the dissident plaintiffs' attorneys collaterally attacked the judgment that approved the class settlement. They argued that the class settlement was void based upon a variety of jurisdictional theories and under this Court's decision in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (June 25, 1997), which was decided after the judgment that approved the factor concentrate class settlement was final. The dissident attorneys argued that the class settlement should be recharacterized as more than 6,000 irrevocable individual settlement offers that class members were free to accept or reject and that the dissident attorneys should be allowed to collect from fractionators up to $66,000 in attorneys' fees from fractionators for each settling client. FA 429, 434-36, 440-46; Opp. App. 16a-17a.

The district court rejected the attorneys' collateral attack upon its judgment. FA 446-48. The court of appeals in a unanimous decision written by Chief Judge Richard Posner, ruminated, in dicta, that the settlement "may well be questionable, both in its form . . . and in its terms," Opp. App. 18a, but then emphatically held:

> [T]here is no question of the district court's having exceeded its jurisdiction in entering the decree. All the requirements of Article III were satisfied.
>
> Even if they had not been, it is unlikely that the settlement could be set aside at this late date. . . . The principle that jurisdictional defects may be noticed at any time is limited . . . by the equally important prinicple that litigation must have an end.

> After a case has become final by exhaustion of all appellate remedies, only an egregious want of jurisdiction will allow the judgments to be undone by someone who, having participated in the case, cannot complain that his rights were infringed without his knowledge.

Opp. App. 18a-19a.[7] This Court denied certiorari. 119 S. Ct. 1488 (1999).

8. Nevertheless, the dissident attorneys persisted in arguing that the judgment that approved the class and settlement was void and that class members could evade the judgment of the district court and unilaterally withdraw from the settlement by refusing to complete the paperwork necessary to receive their settlement checks. Petitioners' counsel of record in this Court contended in November 1998—after the Seventh Circuit had rejected the first collateral attack—that class members who failed to opt out of the class settlement were not barred from pursuing individual litigiation unless they signed and returned release forms. FA 463-64. Petitioner Michael Davon published an Internet posting that stated: "My lawyers tell me that I have no obligation not to pursue my own litigation against the fractionators. The legal people I have consulted feel that even the many people who signed and returned the releases, but who have not been paid, are not bound." FA 148. Another Internet posting stated that class members could opt out of the settlement in one of two ways: (1) "[d]o nothing and not sign the release, and you will then automatically become an opt-out because the contract is not final until the check is signed[,] sealed and delivered" or (2) send a letter to the "Claims Administrator in Chicago expressing there was a breach

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[7] The court of appeals further held that the dissident attorneys were estopped from challenging the class and settlement. Opp. App. 21a.

of contract, as the release is different from the original documents." FA 147.

Acting on this bad advice, petitioner claimant groups Tallakson, Chappie, Helm, Geraldo, Lindgren, Akers, Davon, Castille, Robison, and Jane Doe failed to return release forms. The Lay claimant group returned a release but subsequently purported to revoke the signature on that release. FA 221. The Campbell group went so far as to return settlement monies received after signing the release. FA 118. Petitioners then filed or sought to reactivate their state court lawsuits against fractionators. FA 556-97.

9. On December 21, 1998, fractionators moved to enjoin the state court suits of petitioners. FA 472. Petitioners filed cross motions under Rule 60 seeking relief from the final judgment that approved the factor concentrate settlement. FA 477, 497. The district court ruled in favor of the fractionators and against petitioners. In denying the Rule 60 motions, the district court rejected, *inter alia*, petitioners' arguments that (1) the terms of the release abrogated the class settlement agreement and constituted a new offer that class members were free to reject; (2) the final judgment approving the settlement was void under *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); and (3) the final judgment was void because there was no Article III case or controversy. Pet. App. 6-7. The district court also concluded that, "[c]onsidering the lapse of time itself, and the substantial changes of position made by the numerous participants in the settlement in the meantime, we believe [petitioners'] delay in presenting these motions is inexcusable." Pet. App. 8.

In a separate order entered the same day, the district court granted fractionators' motion for injunctive relief, concluding that "[t]his case is the paradigm situation to

employ the All Writs Act." Opp. App. 6a. Among other things, the district court rejected petitioners' challenge to the requirement that class members execute individual releases in order to receive their settlement checks. The court observed that the release requirement was "particularly appropriate in this case," where the settlement was structured to provide compensation to "claimant groups" rather than individuals. Opp. App. 7a. Moreover, as the district court observed, "[n]ot one word was uttered by these attorneys or their clients, in opposition to the release requirement" before final judgment was entered approving the class settlement. Opp. App. 7a. "For these attorneys to argue at this late date that the requirement of any release at all renders the order of May 8, 1997, somehow unenforceable is a repetition of the kind of bad faith they showed in their delayed challenge to the limitation on their fees." Opp. App. 7a.[8]

9. The court of appeals affirmed in an unpublished order that relied upon the same panel's opinion in the prior collateral attack and the underlying orders of the district court. Pet. App. 1-2.

REASONS THE PETITION SHOULD BE DENIED

This is not a case in which absent class members sought to challenge fundamentally unfair provisions of a class settlement of which they were unaware until after final judgment was entered. Petitioners received notice of the proposed class and settlement, chose to forego individual litigation and to participate in the class settlement, and filed claim forms seeking payment under the terms of that settlement.

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[8] Additional arguments by petitioner Jane Doe were addressed in a separate order of the district court. Opp. App. 10a-14a. Jane Doe has not raised those arguments before this Court.

Petitioners then changed their minds. They now seek to deprive fractionators of their primary, bargained-for benefit under this costly class settlement: peace from litigation. The settlement agreement expressly provided that fractionators would have the opportunity to analyze all opt-out forms to evaluate their post-settlement litigation exposure before committing to go forward with the class settlement. Pet. App. 14 § A2(c). When fractionators ultimately agreed to pay more than $600 million to class members in this settlement, they did so with the understanding that they had been able to evaluate the litigation exposure that would remain after the settlement was implemented.

Petitioners want to change the terms of a done deal. They bandy about the concepts of due process and Article III jurisdiction in an attempt to evade the final judgment that approved the class and settlement. But the arguments that petitioners attempt to raise are not properly presented on the anomalous facts of this case. The petition therefore should be denied.

I. Petitioners first argue that the Court should grant certiorari to "revisit the issue of how the constitutional rights of class members can be vindicated." Pet. 14. They allege that the unpublished decisions below conflict with judgments of several courts of appeals holding that absent class members may raise due process challenges to a final judgment on collateral attack. Pet. 15. *See also* Pet. i. This issue does not merit review for at least five reasons:

A. The decision below does not conflict with the holding of this or any other court. Neither the district court nor the court of appeals held that absent class members are foreclosed from collaterally attacking final judgments. The courts below simply concluded that the arguments presented by these petitioners lack merit—a determina-

tion that is factbound and does not merit review. *See* Pet. App. 1-9; Opp. App. 1a-14a. The cases cited by petitioners stand, at best, for the unremarkable proposition that absent class members are bound by the judgment so long as they were adequately represented and had sufficient notice.[9]

B. The "issue of how the constitutional rights of class members can be vindicated" is not properly presented because petitioners' motions seeking relief from the final judgment were untimely. Motions under Rule 60(b)(4), (5), and (6), the provisions on which petitioners relied,[10] must be made "within a reasonable time." Fed. R. Civ. P. 60(b). *See generally Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863 (1988). Petitioners' decision to challenge the class settlement more than 25 months after they filed for payment under the settlement and 18 months after entry of the final judgment that approved the settlement was unreasonable on its face. Indeed, as the district court observed, petitioners' delay dem-

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[9] *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985) (discussing due proocess requirements to assert jurisdiction over absent class members); *Zablocki v. Redhail*, 434 U.S. 374, 380 n.6 (1978) (noting in passing that appellant, having waived it, could not raise due process challenge on appeal on behalf of absent class members); *Twigg v. Sears, Roebuck & Co.*, 153 F.3d 1222, 1226 (11th Cir. 1998) (collateral attack allowed where notice of settlement was inadequate); *Barney v. Holzer Clinic, Ltd.*, 110 F.3d 1207, 1214 n.11 (6th Cir. 1997) (holding that plaintiff was not member of class; footnote states in passing that adequacy of representation may be challenged on collateral attack); *In re Agent Orange Prod. Liab. Litig.*, 996 F.2d 1425, 1434-35 (2d Cir. 1993) (rejecting, for second time, collateral attack based upon alleged inadequacy of notice and holding blanket conflict of interest claims against class counsel to be unpersuasive), *cert. denied*, 510 U.S. 1140 (1994).

[10] Rule 60(b)(4) authorizes relief from void judgments; 60(b)(5) authorizes, *inter alia*, relief when prospective application of a judgment would be inequitable; 60(b)(6) is the catchall provision of the rule.

onstrated the "bad faith" that was the hallmark of the previous round of collateral attacks. Opp. App. 7a.

Nothing prevented petitioners from bringing a timely challenge to the class settlement. Indeed, their principal arguments—lack of Article III jurisdiction and inadequate representation—could have been presented before the judgment that approved the class settlement became final. Petitioners received individual notice of the provisions of the class settlement in the fall of 1996. By October 15, 1996, each and every one of the petitioners chose to file a claim seeking payment under the terms of the class settlement. FA 91, 107, 119, 128, 138, 150, 191, 201, 211, 222. 251, 261. Many of the petitioners were represented by personal counsel as well as class counsel during this period. FA 265, 142, 123, 154. Several of those lawyers, including petitioners' present counsel of record, expressly told the district court that they did not object to final approval of the class settlement. FA 364, 380. Petitioners made no effort to appeal the final judgment that approved the class settlement. They did not challenge the district court's May 15, 1997, order, which explicitly stated that late opt-outs from the class settlement would be allowed only in extraordinary circumstances. FA 426. Nor did they attempt to establish such circumstances.

Instead, petitioners sat back and waited while fractionators distributed hundreds of millions of dollars to class members, paid more than $30 million to state and federal governments and insurers, established a $40 million attorney fee fund, and incurred millions of dollars in additional costs in connection with the implementation of the class settlement. They waited while dissident plaintiffs' attorneys (who represent many of the petitioners) litigated the identical issues presented in this petition.

Only after fractionators announced that they would seek injunctive relief to block petitioners' state court law-

suits did petitioners decide to file cross motions under Rule 60. FA 471. Given this record, there is nothing extraordinary about the court of appeals' decision that the district court acted within its discretion in concluding that petitioners were not entitled to back out of the settlement.[11]

C. Petitioners concede that the determination that their Rule 60 motions were untimely presents an "impediment" to consideration of their arguments, but contend that Rule 60(b)(4) claims are "not subject to any time limit." Pet. 19-20, n.4.

The court of appeals specifically considered and rejected this argument in disposing of the first collateral attack on the factor cor.centrate class settlement:

> The appellants argue that "when subject matter jurisdiction is lacking or due process has been denied, the final judgment is void, and its nullity must be recognized in any collateral proceeding in which it is asserted as binding." This is an overstatement. The

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11 Before the court of appeals, petitioners attempted to excuse their tardiness by pointing to post-judgment developments—this Court's decision in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), and petitioners' receipt of the release forms that they were required to sign to receive their settlement payments. But *Amchem* was decided on June 25, 1997, just a few weeks after the factor concentrate judgment became final. *See Norgaard v. DePuy Orthopaedics, Inc.*, 121 F.3d 1074, 1075-76 (7th Cir. 1997) (denying Rule 60(b) relief where appellant relied on a Supreme Court decision that had been under consideration when judgment was entered, noting, *inter alia*, that appellant could have taken protective appeal); *Neuberg v. Michael Reese Hosp. Found.*, 123 F.3d 951, 955 (7th Cir. 1997) (Rule 60(b) motion filed 21 months after judgment was untimely where movant had known of problems for 18 months and Supreme Court decision upon which movant relied "had been decided several months beforehand"). Moreover, all petitioners had received their releases by the end of 1997. FA 510. Therefore, these developments cannot explain petitioners' failure to file their Rule 60 motions until December of 1998. FA 477-78.

> principle that jurisdictional defects may be noticed at any time is limited, as we explained in *In re Edwards*, 962 F.2d 641, 644 (7th Cir. 1992), by the equally important principle that litigation must have an end. After a case has become final by exhaustion of all appellate remedies, only an egregious want of jurisdiction will allow the judgment to be undone by someone who, having participated in the case, cannot complain that his rights were infringed without his knowledge.

Opp. App. 18a-19a, *cited in* Pet. App. 1-2.

Petitioners respond that they were "absent" class members and therefore had no duty to raise their objections to the class and settlement before final judgment. Pet. 11-12. This argument fails on the facts of this case because petitioners were not truly "absent" class members in the sense that term ordinarily is used. As set forth above, these petitioners took the affirmative step of filing claim forms that expressly stated petitioners' intention to participate in the settlement, with the knowledge that fractionators would rely on those claim forms in determining whether to go forward with the settlement. *See* Pet. App. 14 § A2(c), 47-48 § O2-3. Petitioners' attorneys, including their present counsel of record, participated in the fairness hearings. FA 351, 360. Thus, petitioners had sufficient information before final judgment was entered to investigate virtually every argument that they now seek to raise on collateral attack. *See Williams v. General Elec. Capital Auto Lease, Inc.*, 159 F.3d 266, 274-75 (7th Cir. 1998) (upholding order barring class members, who received adequate notice, from relitigating their claims in another forum), *cert. denied*, 119 S. Ct. 2392 (1999). They chose not to pursue those arguments. The fact that they later changed their minds about participating in the class settlement does not excuse their failure to raise these

arguments on a timely basis. *See Epstein v. MCA, Inc.*, 179 F.3d 641, 648 (9th Cir.) (adequacy of representation is issue for trial court before entry of final judgment and, where appropriate procedures were followed, should not be second-guessed on collateral review), *cert. denied*, 120 S. Ct. 497 (1999).[12]

D. Petitioners' underlying due process arguments do not merit this Court's review. Petitioners contend that the lower courts never considered their claim that the class was inadequately represented. Pet. 13 n.2.

That is simply untrue. The district court specifically found in its final judgment approving the class and settlement that (a) the class had been vigorously represented by class counsel and a class representative who shared common interests with the class and (b) no collusion existed between class counsel and fractionators. Pet. App. 87. The district court reiterated those findings in response to the first collateral attack by dissident attorneys and the present collateral attack. FA 437; Pet. App. 6-7; Opp. App. 4a, 6a-7a. In rejecting the present collateral attack, the Seventh Circuit explicitly adopted the reasoning of the district court. Pet. App. 1-2.

1. Petitioners nevertheless complain that the class could not have been adequately represented because class

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[12] None of the cases cited by petitioners supports the proposition that classs members and their counsel can refrain from raising timely objections to a class settlement and then collaterally attack the settlement after final judgment has been entered and settlement monies distributed. *See Shults v. Champion International Corp.*, 35 F.3d 1056, 1059 (6th Cir. 1994) (unnamed class members who failed to seek to intervene lacked standing to appeal settlement order); *Gottlieb v. Wiles*, 11 F.3d 1004, 1009 (10th Cir. 1993) (absent class members appealed from denial of motion to intervene); *Croyden Associates v. Alleco, Inc.*, 969 F.2d 675, 680 (8th Cir. 1992) (same; noting that unnamed class members have a variety of options to protect their interests), *cert. denied*, 507 U.S. 908 (1993).

representative Susan Walker stated that approval of the class settlement would provide compensation to persons like herself whose claims were time-barred. Pet. 5-6, 13 n.2. The susceptibility of Walker's claim to a limitations defense made her typical of the class that she represented; not specifically because she was time-barred, but because she had little chance of recovering any money in individual litigation. Indeed, the district court found in its judgment approving the class and settlement that "[m]ost class members are faced with significant problems of limitations, proximate cause and product identification, as well as the task of persuading a jury that defendants should be found negligent on the basis of acts and omissions that preceded discovery of the AIDS virus." Pet. App. 84. Given these facts, it is not surprising that petitioners' counsel of record, who was present at the final fairness hearing at which Walker appeared, found no basis for objecting to her adequacy as a class representative at that time.

2. Petitioners urge that class counsel coerced class members into participating in the settlement because, under the express terms of the settlement agreement, fractionators retained the option of withdrawing if too many class members opted out. Pet. 13 n.2. The coercion charge is unsupported and unsupportable. Class settlement proposals often allow either plaintiffs or defendants to withdraw from a settlement if the number of claimants is different than that anticipated by negotiators. Herbert Newberg & Alba Conte, *Newberg on Class Actions* § 12.12 at 12-33-34 (3d ed. 1992). Here, hundreds of people filed timely opt-out forms, and the settlement nevertheless went forward.

3. Petitioners also assert that fractionators have never claimed that the settlement could survive analysis under *Amchem*. Pet. 13-14 n.3. That is simply untrue. In re-

sponse to the first collateral attack on the judgment that approved the class and settlement, fractionators stated: "Even if *Amchem* applied to this case—and it did not—the decision to certify a class and approve the class settlement constituted a proper exercise of the District Court's discretion." [13] As the district court held in rebuffing that initial collateral attack, the factor concentrate class settlement is fundamentally different from the putative class settlement in *Amchem*. FA 437. Here, the interests of one group of class members are not being sacrificed in favor of others. All eligible class members who follow the procedures for obtaining settlement payments are receiving substantial compensation. Pet. App. 16-21 § B. Persons who preferred to opt out on a timely basis have done so without prejudicing their own interests. Pet. App. 31-33 § F.

In any event, nothing in *Amchem*, which was decided on a direct appeal, suggests that this Court intended to reopen final judgments. *Amchem* was decided not on the basis of constitutional claims, but under Rule 23. 521 U.S. at 612-13.[14] To the extent that *Amchem* established new law governing class settlements, it does not apply to this case because *Amchem* was decided after final judgment was entered approving this class and settlement. *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 95 (1993); *see also Norgaard v. DePuy Orthopaedics, Inc.*, 121 F.3d 1074, 1075-76 (7th Cir. 1997) (denying Rule 60(b)

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[13] *In re Factor VIII or IX Concentrate Blood Prods. Litig., Appeals of Spece and Mull & Mull*, Nos. 98-1438, 1770, 1629, Brief of Appellee Fractionators at 3 (7th Cir. 1998).

[14] An alleged "error in interpreting a statutory grant of jurisdiction is not equivalent to acting with total want of jurisdiction" and therefore does not render a final judgment a nullity. *Kansas City S. Ry. Co. v. Great Lakes Carbon Corp.*, 624 F.2d 822, 825 (8th Cir.), (rejecting collateral attack on final judgment), *cert. denied*, 449 U.S. 955 (1980).

relief where appellant relied upon a Supreme Court decision that had been under consideration when judgment was entered, noting, *inter alia*, that appellant could have taken protective appeal).[15]

E. In an attempt to suggest the existence of circuit conflict where none exists, petitioners engage in page after page of rumination about the Ninth Circuit's decision in *Epstein v. MCA, Inc.*, 126 F.3d 1235 (9th Cir. 1997), *opinion withdrawn and superseded by Epstein v. MCA, Inc.*, 179 F.3d 641 (9th Cir.), *cert. denied*, 120 S. Ct. 497 (1999). Petitioners rely heavily upon a 1997 panel opinion that was later withdrawn. The Ninth Circuit ultimately held that class members do not have a broad right to challenge collaterally the adequacy of representation if the certifying court makes a determination of the adequacy of representation in accordance with this Court's precedent. 179 F.3d at 648 (discussing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). That holding is wholly consistent with the decisions below in the present case.

II. Petitioners next argue that the final judgment approving the class and settlement was void because the district court lacked Article III jurisdiction. They claim that the judgment derived from a "fake," "false and fraudulent" complaint. Pet. 20-21. The record does not support their wild allegations, much less provide a basis for a grant of certiorari.

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[15] Petitioners also rely on *Ortiz v. Fibreboard Corp.*, 119 S. Ct. 2295, 2307 (1999). *Ortiz* is not instructive here because it deals only with a Rule 23(b)(1)(B) class. *See* 119 S. Ct. at 2307. Petitioners here are Rule 23(b)(3) class members, to whom, as this Court recognized in *Ortiz*, the requirements of a limited fund do not apply. *See id.* at 2315 (noting the difference in procedural protections for the two types of class members).

A. As the court of appeals previously concluded, "[a]ll the requirements of Article III were satisfied" with respect to the final judgment approving the class settlement. Opp. App. 18a. It cannot be disputed that a genuine controversy exists between HIV-infected hemophiliacs and fractionators. FA 530-31. The class settlement was negotiated and approved in the context of multidistrict litigation that had been underway since 1993. *In re Factor VIII or IX Concentrate Blood Prod. Liab. Litig. (MDL-986)*, 853 F. Supp. 454 (J.P.M.L. 1993). That litigation was hotly contested. As the district court observed in approving the final settlement, "[t]he docket is over 70 single-spaced pages, one indicator of the extent of this controversy." Pet. App. 86. Dozens of hearings and pretrial conferences had been held and the court had ruled upon numerous contested issues, including almost 100 discovery motions. Pet. App. 86.

The class action complaint asserted that fractionators were liable under a number of negligence and strict liability theories. FA 269, 281-83. Fractionators answered the complaint and denied those claims. FA 286-319. The settlement proposal negotiated by fractionators and plaintiffs' class counsel was subject to two fairness hearings after conditional certification of the class. FA 338, 357. The district court stated that it would reject the class settlement if certain issues relating to government and insurer reimbursement claims against class members were not promptly resolved. FA 348, 351. Had the class not been finally certified and the settlement approved, then the fractionators would have litigated Susan Walker's case, just as they are litigating numerous other cases in state and federal court.

B. Petitioners nevertheless assert that there was no case or controversy because the parties had reached a tentative settlement agreement before the complaint was filed. Pet. 20-22. If that were the law, then courts would

lack jurisdiction over most consent decree litigation. *See SEC v. Randolph,* 736 F.2d 525, 527 (9th Cir. 1984) (reversing district court judgment "holding that no case or controversy existed because the parties arrived in court with the proposed judgment in hand"). Courts also would lack jurisdiction to approve settlements in cases that had been litigated for years; under petitioners' theory, courts overseeing such cases would lose jurisdiction the moment the parties came to terms. "The fact that the parties have arrived at a settlement agreement, however, does not lead inevitably to the conclusion that no controversy exists between the parties up to the time the judgment is entered." *Amalgamated Sugar Co. v. NL Indus., Inc.*, 825 F.2d 634, 640 (2d Cir.) (holding consent judgment was entitled to res judicata effect), *cert denied*, 484 U.S. 992 (1987).

In direct appeals in *Amchem* and *Ortiz,* this Court declined to address similar arguments, that, if accepted, would effect major changes in the law. Certainly, petitioners' collateral attempts to rewrite jurisdictional law should be rejected.

C. Petitioners also suggest that the class representative's comment that her individual claim might be time-barred deprived the district court of jurisdiction. Pet. 5-6, 13 n.2. The strengths and weaknesses of the class representative's individual claim have nothing to do with Article III's requirement that there be a case or controversy. If a defendant prevails on a motion for summary judgment on limitations grounds, the plaintiff's case is dismissed; the court does not lose jurisdiction. Therefore, the possibility that fractionators could have asserted limitations as an affirmative defense against the class representative did not deprive the district court of jurisdiction.

D. Similarly, it is irrelevant that the Seventh Circuit had previously decertified an inventive but fatally flawed

attempt to litigate the issue of negligence in a single class trial involving the law of nearly every state. *See In re Rhône-Poulenc Rorer Inc.*, 51 F.3d 1293, 1296 (7th Cir.), *cert. denied*, 516 U.S. 867 (1995). The *Walker* class simply did not present the same Seventh Amendment and other infirmities inherent in the district court's earlier trial plan. Nothing about that decision deprived the district court of jurisdiction over a subsequent class action complaint.

III. Finally, petitioners ask this Court to grant certiorari because fractionators allegedly engaged in a "bait and switch" by requiring class members to sign individual releases that purportedly did not coincide with the scope of the settlement agreement and the notice provided to class members. This inherently factbound claim does not warrant review.

The settlement agreement expressly provided that claimants would be required to sign releases in order to receive payment. Pet. App. 46 § M. The district court carefully reviewed the terms of the releases, the settlement agreement, and the final judgment approving the class settlement, and concluded that the releases were consistent with the settlement. FA 440-43; Pet. App. 6; Opp. App. 6a-7a.[16] Over 6,000 claimant groups signed that release. In rejecting the first collateral attack on the final judgment, the Seventh Circuit found no support for the claim that fractionators had engaged in "bait-and-switch" tactics. Opp. App. 17a. In rebuffiing petitioners' present collateral attack, the court of appeals relied on the reasoning of the district court. Pet. App. 1-2. There is nothing about these determinations that merits the review of this Court.

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[16] *See Matter of VMS Sec. Litig.*, 103 F.3d 1317, 1321 (7th Cir. 1996) ("Given that the power to implement a settlement agreement between the parties inheres in the district court's role as supervisor of the litigation, the exercise of that power is particularly appropriate for deferential review").

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDICES

APPENDIX A

March 3, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MDL-986

IN RE FACTOR VIII OR IX CONCENTRATE
BLOOD PRODUCTS LITIGATION

No. 96 C 5024

SUSAN WALKER, Administratrix of the
Estate of Steven Walker, Deceased,
Plaintiff,

v.

BAYER CORPORATION, BAXTER HEALTHCARE
CORPORATION, ALPHA THERAPEUTIC CORPORATION and
ARMOUR PHARMACEUTICAL COMPANY,
Defendants.

INJUNCTION ORDER

Consistent with the Final Order and Judgment in this case on May 8, 1997, and the Order Concerning Requests for Late Opt-Outs entered by the Court on May 15, 1997, and pursuant to this Court's authority under the All Writs Act, 28 U.S.C. § 1651, IT IS HEREBY ORDERED THAT:

1. The putative class action, *Diaz v. Alpha Therapeutic Corporation*, Nos. 97 C 8468 and 98 C 627 (N.D. Ill.), is permanently enjoined. Named plaintiffs Celeste Diaz, Mark Laam, Judy Trullinger, Shirley Carlise, and Scott Carthey, who filed timely opt-outs from the *Walker* class settlement, remain free to file individual lawsuits in appropriate venues. Named plaintiffs Michael and Mary Castille and Joseph Singler are permanently enjoined from instituting, assigning, maintaining, collecting or prosecuting claims against defendants, or any of them, arising out of any injury, disease, or harm of any kind that the HIV infected person and members of such person's Claimant Group allegedly suffered as a result of use of factor concentrate processed and distributed during the period from 1978 through 1985, as described in the Settlement Agreement and this Court's final judgment of May 8, 1997.

2. The following persons who failed timely to opt out of the *Walker* class settlement are permanently enjoined from instituting, assigning, maintaining, collecting or prosecuting any such claims against defendants as those described above in paragraph 1: Michael Akers; Michael Harrington; Lan Dusty Nguyen; Michael and Carolyn Coons; Phillip Campbell; Matthew Damon Chappie; Michael Davon; Trina Geraldo; Mark S. Helm; Sylvan Hart; Victor K. Horr; mother of Henry Lay; Anthony Lindgren; Shawn A. Robison; Eric Sommes; Aaron Tallakson; Victoria Tody; Carl Weixler; and Lillian D. Noblett and Enid F. Eckert, the heirs of Ross Eckert.

DATE: March 3, 1999 ENTER:

/s/ John F. Grady
JOHN F. GRADY
United States District Judge

APPENDIX B

March 3, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MDL-986

IN RE FACTOR VIII OR IX CONCENTRATE
BLOOD PRODUCTS LITIGATION

No. 96 C 5024

SUSAN WALKER, Administratrix of the
Estate of Steven Walker, Deceased,
Plaintiff,

v.

BAYER CORPORATION, *et al.*,
Defendants.

MEMORANDUM OPINION ON FRACTIONATOR DEFENDANTS' MOTION TO ENJOIN CERTAIN CLASS MEMBERS FROM LITIGATING DUPLICATIVE LAWSUITS

In a separate order entered this date, the court is denying the motions of certain class members to relieve them from the bar against proceeding with other lawsuits that was contained in the order of May 8, 1997, approving the class settlement in this case. We now turn to a motion the fractionator defendants have made to enjoin the

lawsuits these same plaintiffs have filed or may intend to file in other courts.

In today's companion order, we pointed out that the arguments advanced by the Rule 60 movants were essentially the same ones their attorneys had made in the litigation over attorneys fees. That is, they argued that the *Walker* settlement was void under *Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231 (1997), and that the settlement is not binding on these plaintiffs in any event because defendants abandoned the settlement and extended "new offers" to the plaintiffs, which they were free to refuse. We noted that we have previously addressed these arguments and found it unnecessary to do so again. We will treat the "voidness" and "new offer" arguments in the same way here, referring to them only to the extent necessary for context.

The present motion seeks to enjoin the prosecution of lawsuits brought by these attorneys in state and federal courts on behalf of class members who elected not to opt out of the class and on behalf of opt-outs who purport to serve as class representatives of class members who did not opt out. Defendants' argument is that these plaintiffs are barred by the order of May 8, 1997, from proceeding with these separate actions, either individually or as purported class representatives. Defendants invoke our authority to enforce the terms of the settlement pursuant to Rule 23 of the Federal Rules of Civil Procedure as well as our power under the All Writs Act, 28 U.S.C. § 1651(a). We enjoined the attorneys from seeking fees apart from the cost and fee fund under the same authority. See Order of February 18, 1998 at 20 n.8. In its *mandamus* decision, the Seventh Circuit approved the injunction as a proper exercise of this court's authority under the All Writs Act. *In re Factor VIII or IX Blood Prods. Litig.*, 159 F.3d at 1020.

Realizing that this court has previously considered and rejected their basic arguments, the plaintiffs, while renewing those arguments, oppose the requested injunction on additional grounds, as well. The new arguments still depend upon the basic notion that the May 8, 1997, order is void under *Amchem* and that the "new offers" have abrogated the settlement.

Plaintiffs contend that the injunction requested by defendants under the All Writs Act is inappropriate because an alternative exists: defendants could assert the May 8, 1997, order as *res judicata* in each of the actions they seek to enjoin. Plaintiffs point to certain statements of this court at the status conference of November 18, 1998, where we suggested that this approach would be preferable to an injunction.

In retrospect, the court's remarks at the November 18 status conference were premature. The issue had not been briefed at that time, and we had not fully considered the ramifications of our suggstion. Defendants correctly point out that it would be unreasonable for them to have to raise a *res judicata* defense in each of the cases these plaintiffs have filed or might file in the future. Raising the defense would involve the need to acquaint a number of different judges with the complex legal and factual issues in this litigation and, of necessity, the possibility of inconsistent rulings. The party who lost the argument in each trial court would be sure to appeal, adding further expense and the possibility of inconsistent appellate rulings. In short, the plaintiffs propose an inordinately expensive, duplicative, and ineffective means of resolving the question of whether the order of May 8, 1997, bars additional litigation by these plaintiffs. In contrast, an injunction by this court, reviewable only by an appellate court already familiar with the controversy, provides an

incomparably better alternative. This case is the paradigm situation to employ the All Writs Act.

The attorneys who represent these plaintiffs could have asserted the same kind of argument in the fee controversy. They could have argued that an injunction was not necessary because there was an available alternative: defendants could raise the May 8, 1997, order as a bar to the collection of any percentage fees where the attorneys might obtain a judgment against the defendants on behalf of a client, or as a defense to any suit brought directly against the defendants by the attorneys on one or more of the theories of liability (interference with contract, fraud, etc.) they had asserted in that controversy. However, the attorneys did not make that argument, nor did the Court of Appeals suggest that this court should have stayed its hand because of the availability of such an alternative.

Plaintiffs argue that in order to invoke the All Writs Act, this court must have independent jurisdiction over the persons to be enjoined. Plaintiffs are wrong. The Act applies to them because it extends to all persons who wrongfully seek to frustrate a federal court order, whether or not they were ever parties to the case in which the order was entered. *United States v. New York Tel. Co.*, 434 U.S. 159, 174 (1977); *In re Baldwin-United Corp.*, 770 F.2d 328, 338 (2d Cir. 1985). Some of these plaintiffs are members of the settlement class who did not opt out, and there can be no question of our jurisdiction over them. The All Writs Act gives us jurisdiction over the other plaintiffs who did opt out but have filed class actions in which they purport to represent class members who did not opt out.

The second major argument made by the plaintiffs is a farrago of previous contentions attacking the validity and continued viability of the settlement. They contend that the settlement is void under *Amchem*, that the tendered

releases departed from the terms of the settlement and therefore constituted new offers, and that there is no consideration for the releases as tendered. Therefore, plaintiffs argue the settlement is a nullity as applied to them, and this court has no authority to enforce the settlement order.

Plaintiffs contend in this connection that to require *any* release in the settlement of a class action is "virtually unheard of." The contention that no release can be required as a condition of payment is another example of something plaintiffs' attorneys could have raised on behalf of their clients *before* the settlement was approved. The settlement agreement approved by the court after extensive hearings specifically provided for releases. That requirement was particularly appropriate in this case, where entitlement to the payments would belong not only to individuals but sometimes to "claimant groups." The possibility of disputes among group members was easily foreseeable. Obtaining releases from each member of the group was an obvious way of extinguishing all claims in the group. Not one word was uttered by these attorneys or their clients, in opposition to the release requirement and we entered the order of May 8, 1997, in the belief that the settlement agreement was satisfactory to all class members who had not objected to it. For these attorneys to argue at this late date that the requirement of any release at all renders the order of May 8, 1997, somehow unenforceable is a repetition of the kind of bad faith they showed in their delayed challenge to the limitation on their fees.

We continue to believe that the order of May 8, 1997, is valid and enforceable. Defendants bargained for the benefit of the order, and they are entitled to that benefit. The only sensible way to enforce the portion of the order

that bars the filing of other lawsuits is to enjoin these plaintiffs from filing or prosecuting such suits. Accordingly, the proposed injunction order tendered by the defendants will be entered, with one modification.[1]

Two of the cases that defendants seek to enjoin, the *Diaz* and *Harrington* suits, were removed from state court to federal court and then transferred here as part of the MDL. Plaintiffs have pending motions to remand those cases to state court for an alleged lack of federal subject matter jurisdiction. Defendants argue that it is unnecessary to decide the remand motions if the suits are enjoined, and we agree. But something has to be done with the remand motions. Denying them as moot would seem inappropriate where there is an unresolved challenge to federal jurisdiction. We suggest that defendants withdraw their opposition to remand. This court could then remand the cases to the state courts where they were filed. The cases would be subject to the injunction, and plaintiffs would be unable to prosecute them. Defendants could then file in the state courts whatever motions would be appropriate in light of the injunction.

Defendants should notify the court and the *Diaz* and *Harrington* plaintiffs by March 9, 1999, as to whether they withdraw their opposition to plaintiffs' remand motions. If they do, the court will grant the motions.

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[1] The modification is that instead of limiting the opt-out plaintiffs to filing individual suits "in their home states" they will be permitted to file individual suits "in appropriate venues."

CONCLUSION

For the foregoing reasons, Fractionator Defendants' Motion to Enjoin Certain Class Members from Litigating Duplicative Lawsuits is allowed. The injunction will be entered this date.[2]

DATE: March 3, 1999 ENTER:

/s/ John F. Grady
JOHN F. GRADY
United States District Judge

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[2] The plaintiff Jane Doe, represented by Roy G. Spece, has a separate motion pending which seeks relief from the May 8, 1997 order, on the ground that the defendants agreed to allow her to opt out of the settlement class. The court has requested further briefs on that motion. In the event the motion is granted, we will vacate the injunction as to plaintiff Jane Doe. If we deny the motion, the injunction will remain in effect as to her.

APPENDIX C

April 16, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MDL-986

IN RE FACTOR VIII OR IX CONCENTRATE
BLOOD PRODUCTS LITIGATION

No. 96 C 5024

SUSAN WALKER, Administratrix of the
Estate of Steven Walker, Deceased,
Plaintiff,

v.

BAYER CORPORATION, BAXTER HEALTHCARE
CORPORATION, ALPHA THERAPEUTIC CORPORATION and
ARMOUR PHARMACEUTICAL COMPANY,
Defendants.

ORDER

The court has under advisement the Motion of the Fractionator Defendants to Enjoin the Lawsuit of Jane Doe and the corresponding Motion of Jane Doe for Relief from judgment. The ultimate issue presented by both motions is whether Doe should be granted relief from the order of May 8, 1997 barring other lawsuits by class members who did not timely opt out of the class settle-

ment and from the injunction order of March 3, 1999, specifically enjoining the lawsuits which certain class members, including Doe, have filed in other jurisdictions. In our memorandum opinion of March 3, 1999 (p. 8 n.2), we indicated that in the event Jane Doe's motion were allowed we would vacate the injunction as to her.

An understanding of the dispute requires revisitation of a concern the court had at the time it approved the class settlement. It was the desire of everyone involved, including the court, to ensure that each settling class member, or claimant group, would receive the sum of $100,000 net of attorneys fees and net of any liens or claims for reimbursement by medical insurers or providers. The court recognized that the accomplishment of this objective would be time-consuming, complicated, and, perhaps in some cases, unsuccessful because the lien or reimbursement claimants might be unwilling to waive their claims. The court wanted to give the parties adequate time to exhaust the possibility of obtaining the necessary waivers but, on the other hand, to provide for a point at which class members would be free to opt out of the class if the necessary waivers could not be obtained. Therefore, in our order of March 5, 1997, we provided,

> With respect to class members whose public reimburse ment/subrogation or eligibility issues are not resolved by December 31, 1997, the court intends to terminate the settlement as to those class members and deem them opt-outs from the date of such termination.

What we intended by the above-quoted provision was to afford protection to class members who had elected not to opt out on the assumption that their receipt of a net of $100,000 could be guaranteed but whose expectation would be disappointed by an inability to resolve a lien or reimbursement claim. A class member in such a pre-

dicament could derive no benefit from the settlement (most of the medical bills incurred by class members far exceeded the $100,000), and the only thing left to do would be to proceed with whatever lawsuit could be maintained. For that purpose, we would terminate the settlement as to such [a] class member and deem the class member an opt-out from the date of the termination.

It was not the court's intent to permit a late opt out by a class member whose $100,000 settlement would not be subjected to diminution by a lien or reimbursement claim, but who nonetheless belatedly decided that he or she would be better served by proceeding with an individual action. The time limit for opt outs was subject to extension in individual cases based on extraordinary circumstances, but a mere change of heart about the attractiveness of the settlement versus opting out was not such a circumstance.

With this background, we turn to an examination of the case of Jane Doe, who did not timely opt out but who has filed a lawsuit in the state of California against the fractionator defendants and desires to proceed with it notwithstanding the bar order of May 8, 1997 and the injunction order of March 3, 1999.

Jane Doe has two arguments. Both of them are based on the proposition that Inter Valley Health Plan had an enforceable claim against Jane Doe's $100,000 settlement for the amounts of the medical benefits it had provided to Jane Doe's deceased husband in connection with the HIV infection that resulted in his death. The first argument is, that Jane Doe was an automatic opt out by reason of the fact that the claim of Inter Valley had not been settled by the "deadline" of December 31, 1997. The second argument is that by reason of an agreement arrived at between the counsel for Jane Doe and counsel for the Fractionators, Jane Doe was entitled to opt out

in return for waiving an appeal from the order of May 8, 1997. These arguments are convoluted, difficult to follow, and, to the extent they are based upon an alleged agreement with counsel for the Fractionators, not supported by the record. But most importantly, Doe has failed to show that Inter Valley has any claim against her personally, or any claim against the proceeds of her claim against the defendants for the wrongful death of her husband. The defendants have satisfied the court that under the law of California Jane Doe's wrongful death claim does not entitle her to seek recovery of medical expenses incurred by or on behalf of the decedent. Therefore, Inter Valley had no lien or reimbursement claim that had to be waived before Jane Doe would be entitled to retain the entire $100,000 settlement.

But more than that, even assuming Inter Valley did have a claim against Jane Doe or her $100,000 settlement, the Fractionators obtained a waiver of that claim in return for a payment of $5,000 to Inter Valley. While Doe suggests that Inter Valley might attempt to set aside this settlement on the basis that there was a "misrepresentation" by the Fractionators, there is no evidence that there was any misrepresentation and no reason to suppose that Inter Valley would have any success in setting aside the settlement should it ever decide to make the effort.

In short, it does not appear that Jane Doe's $100,000 settlement was subject to any claim by Inter Valley Health Plan to begin with, but even if it had been, that claim has been fully settled.[1] The December 31, 1997 "dead-

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[1] Doe makes the point that there must have been some validity to Inter Valley's claim, otherwise the Fractionators would not have paid $5,000 to settle it. But in the context of this $600,000,000 settlement, a $5,000 payment is nothing more than nuisance value. The Fractionators never acknowledged that Inter Valley had a viable claim, and the $5,000 payment is consistent with a desire

line" which the court intended as a shield for any unfortunate class members who could not obtain the necessary waivers, has been seized upon by Jane Doe as a sword. She relies upon a non-existent lien of Inter Valley to relieve her of her decision not to opt out of the class and to accept the settlement.[2] What Doe is attempting to do is to turn a non-existent lien problem into an excuse for a late opt out that will permit her to pursue what she regards as an option more advantageous than the settlement. She has not persuaded us that she has any right to do that.

Accordingly, the Fractionator[s'] motion to enjoin the lawsuit of Jane Doe is allowed, and Jane Doe's motion for relief from judgment is denied. The effect of these rulings on the two motions is that this court's injunction order of March 3, 1999, remains in effect as to Jane Doe.

DATE: April 16, 1999 ENTER:

/s/ John F. Grady
JOHN F. GRADY
United States District Judge

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simply to close the matter out. It is Do[e] who needs to explain why, if Inter Valley thought it did have a viable claim under California law, it would settle for the trivial sum of $5,000.

[2] It should be noted that there was nothing self-executing about the December 31, 1997 date. We provided in our order of March 5, 1997 that any class member whose lien or reimbursement issues had not been resolved by that date would have the settlement terminated and would be deemed an opt-out as of the date of the termination. The court made no such determination as to Jane Doe, nor would it have made such a determination had she requested it, since there was no lien or reimbursement issue that was any problem for her.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 98-1438 and 98-1770

IN RE FACTOR VIII OR IX CONCENTRATE BLOOD PRODUCTS LITIGATION,

APPEALS OF ROY G. SPECE, JR., ROSE MARIE IBANEZ, and MULL & MULL.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 96 C 5024—John F. Grady, *Judge*.

No. 98-1629

IN RE MULL & MULL.

Petition for a Writ of Mandamus.
No. 94 C 5324—John F. Grady, *Judge*.

Submitted September 8, 1998—Decided October 19, 1998

Before POSNER, *Chief Judge*, and BAUER and ROVNER, *Circuit Judges*.

POSNER, *Chief Judge*. Five years ago, a nationwide class action was filed on behalf of hemophiliacs who had been infected in the early 1980s with AIDS virus (HIV) contained in blood solids manufactured and sold by the defendant drug companies for the treatment of hemophilia. Blood solids are manufactured from blood sold or donated to blood banks and the defendants had failed either to screen the blood for HIV or to process the blood in a way that would kill any HIV in it. The class claimed that the defendants were negligent in not taking these precautions. After we granted mandamus, on grounds unnecessary to recite here, to decertify the class, *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995), the parties' lawyers continued to negotiate over a mass settlement of the estimated 6,000 suits that either had been or were expected to be filed by or on behalf of infected hemophiliacs. The negotiations resulted in the certification of the class, though this time for settlement only, and the entry, last year, of a consent decree. The decree provided that each member of the class who was willing to release the defendants from liability would receive $100,000 net of attorneys' fees and that the defendants would establish a $40 million fund out of which attorneys' fees would be paid in amounts to be determined by the judge. The decree extinguished the rights of the lawyers for those class members who signed a release to enforce their contingent-fee contracts with such members, because it provided that "no attorney's fee shall be payable by any class members other than those fees approved by the Court to be payable from the [$40 million] fund." Contingent-fee contracts generally entitle the lawyer to 33 to 40 percent of any judgment or settlement. In the case of a settlement that yielded a net of $600 million

to the claimants, this would mean lawyers' fees of $300 to $400 million (since a gross settlement of $900 million would yield the claimants $600 million if their lawyers were entitled to 33 percent), not $40 million, actually less than $40 million since the fund was to be the exclusive source of court costs as well as attorneys' fees.

The few appeals from the consent decree were voluntarily dismissed. The process of obtaining releases from members of the class began and is now substantially completed, with some 5,200 class members having executed releases and been paid $100,000 each. Several hundred of these class members are represented by the lawyers who have filed, on their own behalf and not on behalf of their clients, the two appeals and the petition for mandamus that are before us for decision today.

These lawyers accuse the lawyers for the class and for the defendants—groundlessly, as far as we can tell—of defamation, bait-and-switch tactics, hoodwinking, infamy, dishonesty, illegality, intimidation, extortion, hypocrisy, hysteria, and Marxism. Yet they did not oppose the settlement. They objected initially to the amount of the settlement but their objection was rejected after a hearing and they did not renew their opposition or appeal from the consent decree, of which their clients have, as we have noted, taken full advantage. And at no time did they object to the attorney's fee provision of the settlement. Only after the time for appealing from the consent decree had run did these lawyers advise the district court of their view that the consent decree was invalid insofar as it limited their fees and barred them from trying to enforce their contingent-fee contracts with their clients. They also instituted collateral attacks on the settlement in the state courts of Louisiana, which resulted in a temporary cessation of payments by the defendants to the clients of these lawyers. The district judge responded to

these shenanigans by enjoining the lawyers from attempting to enforce their contingent-fee contracts or liens based upon them, and he declared the contracts void to the extent that they are inconsistent with the consent decree. The lawyers have challenged his actions both by appealing and by seeking mandamus.

The injunction is appealable without regard to finality, 28 U.S.C. § 1292(a)(1), and if the appellants are correct that the consent decree is "void," then the injunction, being ancillary to it, would fall with it. If the consent decree were truly void, the injunction based on it would presumably also be void, and so unappealable because a void order imposes no obligations; but in that event mandamus would lie to vacate the injunction. *DDI Seamless Cylinder Int'l, Inc. v. General Fire Extinguisher Corp.*, 14 F.3d 1163, 1166 (7th Cir. 1994). The settlement embodied in the consent decree may well be questionable, both in its form (cf. *Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231 (1997), disapproving "settlement classes," albeit in different circumstances from those of this case) and in its terms. That *all* the members of the class should receive the *identical* payment, even though the strength of their cases (some of which appear to be barred by the statute of limitations) and the amount of their damages must vary greatly, is downright weird. But there is no question of the district court's having exceeded its jurisdiction in entering the decree. All the requirements of Article III were satisfied.

Even if they had not been, it is unlikely that the settlement could be set aside at this late date. The appellants argue that "when subject matter jurisdiction is lacking or due process has been denied, the final judgment is void, and its nullity must be recognized in any collateral proceeding in which it is asserted as binding." This is an overstatement. The principle that jurisdictional defects

may be noticed at any time is limited, as we explained in *In re Edwards*, 962 F.2d 641, 644 (7th Cir. 1992), by the equally important principle that litigation must have an end. After a case has become final by exhaustion of all appellate remedies, only an egregious want of jurisdiction will allow the judgment to be undone by someone who, having participated in the case, cannot complain that his rights were infringed without his knowledge. *Stoll v. Gottlieb*, 305 U.S. 165, 171-72 (1938); *In re Edwards, supra*, 962 F.2d at 644; *Restatement (Second) of Judgments* § 12 (1982). (On the significance of participation, see, e.g., *Williams v. General Electric Capital Auto Lease, Inc.*, No. 97-1321, 1998 WL —— at *——-—— (7th Cir. Oct. 2, 1998).)

The practical wisdom of this rule is shown by the present case. The defendants have paid out more than $500 million. Are they now to go around to all 5,200 class members whom they have paid and ask for their $100,000 back so that this litigation can return to its starting point? Not that the appellants are asking for this. They just want more fees. But the $40 million cap on attorneys' fees was an important part of the deal from the defendants' stand-point, given their commitment to pay each class member a net of $100,000, so that the attorneys' fees would have to come out of the defendants' pockets. If the cap is to be lifted the entire settlement must be rescinded and the parties returned to square one by the return of the moneys paid out under it. This would also have to happen if the appellants decided to seek additional fees not from the defendants but from their own clients; the defendants wouldn't care, but of course the clients would be entitled to rescind their releases, which had been premised on the receipt of $100,000 net.

We are mindful that Fed. R. Civ. P. 60(b)(4) authorizes, and the cases interpreting it require, "void" judg-

ments to be set aside at any time. *United States v. Indoor Cultivation Equipment*, 55 F.3d 1311, 1317 (7th Cir. 1995); *Bally Export Corp. v. Balicar, Ltd.*, 804 F.2d 398, 400 (7th Cir. 1986). But set aside *by the district court*; it is there that the motion must be filed; and the appellants have never filed such a motion. But we don't want to give them false hopes. They will gain nothing by trying to file such a motion in the future. For "void" is just the name we give to those judgments that can be set aside without regard to the usual limitations on challenging judgments after they have become final by exhaustion of appellate remedies; and as the authorities cited in the preceding paragraph make clear, a judgment is not to be pronounced void merely because the court that entered it may not have had jurisdiction. And, needless to say, substituting for a 60(b)(4) motion in the district court a petition for a writ of mandamus in the court of appeals (cf. *Cohen v. Illinois Institute of Technology*, 581 F.2d 658, 662 (7th Cir. 1978); *Cinerama, Inc. v. Sweet Music, S.A.*, 482 F.2d 66, 71 n.3 (2d Cir. 1973) (Friendly, J.)) shouldn't enlarge the meaning of "void." Indeed, given the rule, the only occasion for using mandamus—a last resort, a safety hatch where no other vehicle for obtaining judicial relief is available, e.g., *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980) (per curiam)—to get rid of void judgments would be where Rule 60(b)(4) relief had been sought in the district court and denied there, and the order denying it was unappealable, as in *Moses v. Banco Mortgage Co.*, 778 F.2d 267, 275 (5th Cir. 1985). That is not this case.

Rule 60(b)(3) allows judgments to be set aside on the ground of fraud, and the appellants argue that the settlement was procured by fraud. But this rule (unlike 60(b)(4)) has a time limit of one year, which the appellants have now exceeded, for as we have said they never filed a Rule 60(b) motion, and so it is now too late for

them to file such a motion bottomed on subsection (3). Anyway their allegations of fraud are fantastic and even preposterous. The most fantastic is the claim by one of them that he was on the verge of negotiating a $1.8 billion settlement with the defendants when the class lawyers by a dastardly maneuver preempted him by agreeing to accept a measly $600 million. If this were true, which we do not for a moment believe, the lawyer would have been ethically obligated, as well as impelled by powerful motives of self-interest, to bring this to the attention of the district judge in the hearing that the judge conducted (and the lawyer attended) on the fairness of the proposed settlement.

Even if *someone* might have been or might still be able to challenge the settlement, presumably someone who had not had notice of or a fair opportunity to participate in the proceeding yet had been adversely affected by it, it is not these lawyers. Having participated in the settlement proceeding and having failed to make timely objection to it, they are barred by the principles of waiver and equitable estoppel from challenging the settlement after it has become final and the defendants have paid and the class members have received hundreds of millions of dollars. *Skelton v. General Motors Corp.*, 860 F.2d 250, 259 (7th Cir. 1988).

Since the settlement stands, the judge's power to issue the injunction (and related declaratory relief) against these lawyers' enforcing the contingent-fee contracts or liens based upon them was a proper exercise of the court's jurisdiction under 28 U.S.C. § 1651 ("all writs") to prevent interference with its orders. E.g., *United States v. New York Telephone Co.*, 434 U.S. 159, 172 (1977); *Williams v. General Electric Capital Auto Lease, Inc.*, *supra*, at *——; *United States v. Silva*, 140 F.3d 1098, 1103 (7th Cir. 1998); *In re VMS Litigation*, 103 F.3d 1317, 1324 (7th Cir. 1996); *In re Agent Orange Product*

Liability Litigation, 996 F.2d 1425, 1431 (2d Cir. 1993). The settlement agreement guaranteed all acceding class members $100,000 free of attorneys' fees. The appellant lawyers are now claiming the right to sue their clients for a third or more (whatever the contingent-fee contract provides) of the $100,000. This claim is not only a dagger aimed at the heart of the settlement and therefore properly enjoinable; it raises serious ethical concerns. Having induced their clients to sign releases under the impression that the consideration for the release was $100,000 net, the lawyers now assert a right to turn on the clients and take for their own benefit a substantial fraction of that purportedly net recovery. It is true that they *don't* want to sue their clients, or even to undo the settlement; they would be quite content to take the $15 million or so that they think their contingent-fee contracts entitle them to out of the $40 million costs and attorneys' fees fund, and indeed would greatly prefer this route to having to sue hundreds of individuals. But if they did get what they are seeking out of the fund, the settlement would come apart, to the detriment of their clients, because there wouldn't be enough money for the other lawyers. In any event, the appellants' insistence that notwithstanding the consent decree the contingent-fee contracts remain valid and enforceable—which means enforceable against the clients who signed them—created a sufficient danger to the clients (as well as causing the delay in payment to them that we mentioned earlier) to warrant the district court's enjoining these lawyers from trying to enforce the contracts.

The order of the district court is

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit